Chapter 1

CASES

A. THE COMMON LAW

Should we ask, what is "law"? (Did you ask yourself that when you decided to "study law"?) Richard Posner, noted teacher and scholar, and since 1981 also a judge on the United States Court of Appeals for the 7th Circuit, has said that "what is law?" is a "question that has little practical significance if, indeed, it is a meaningful question at all." He said this in an article entitled *The Decline of Law as an Autonomous Discipline.*[1] What do you suppose it means to speak of law as "autonomous"? Surely one cannot think about "law's" autonomy without thinking about what "law" is. Hence, how can it possibly not be meaningful to ask precisely that question? And how can it not be of the greatest practical significance: how can you learn to "do law" if you do not know what it is you are learning to do? Or will you learn what it is by doing it?

Assuming that at least for the time being we cannot or should not ask what law is, let's start with a narrower question: what are the components of American law? The usual, formal answer is that they are three. *Constitutional law*, which is outside the scope of this book, consists of the federal and state constitutions and the judicial decisions interpreting and applying them. In general, constitutional law concerns the structure and powers of government, particularly vis-à-vis the individual. *Statutory law* consists of laws enacted by a legislature. Statutes have become an increasingly central part of our legal system, both at the federal and the state level. Statutory interpretation is a complex and controversial matter, which we address in Part II. (Tied to statutes are *regulations*; these are rules promulgated by administrative agencies pursuant to statutory authority that flesh out, clarify, or implement statutes.) The third distinct body of law is the *common law*. It is that part of the legal system of the United States that consists in its entirety of a body of past judicial decisions, as those decisions were rendered in particular "cases." Part I of this book is devoted to the methods of the common law.

Unlike statutory and constitutional law, the common law rests on no authoritative text external to the judiciary. The law is knowable only by reading past "cases"; it is not to be found anywhere other than in those very cases (and in *non* authoritative summaries of them). What marks common law as distinct, then, is its self-generating aspect. That is, "appropriate references for justifying legal decisions are prior legal decisions of the same order, and . . . every decision serves as

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[1] Richard A. Posner, *The Decline of Law As an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 765 (1987).

a reference for future decisions."[2] (You will learn more about this when we discuss precedent in Chapter 5.) The motor of this "common law self-generativity . . . [is] the role of individuals — ordinary legal persons — in generating legal norms, and the need of individuals to keep transforming them,"[3] in other words, the role of ordinary legal persons in bringing about the "cases" you will study. Or, in still other words, *you as lawyers will make "the law"*: in the cases you will bring, the advice you will give, the arguments you will make, you will generate the precedents that will guide the next generation of lawyers. Thus, one possible answer to our initial question ("what is law?") is that, at least in "common law," *law is application* — application of legal norms by individuals in ordinary interactions.[4]

You should note that "common law" is unique to Anglo-American law. Other countries, even those that have similar democratic aspirations, do not produce a "common law." They (Western Europe, all of Central and South America, many parts of Asia and Africa, and even a few enclaves in the common law world, namely, Louisiana, Quebec, and Puerto Rico) have instead a "civil law" system.[5] Such a system relies primarily on comprehensive, though highly generalized, written codes, rather than on the accumulated body of judicial decisions. It has its origins in Roman Law (which has influenced Anglo-American law as well).[6] The broad acceptance of the civil law is worth remembering, because, as the great Karl Llewellyn[7] admonishes us:

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[2] Arthur J. Jacobson, *Autopoietic Law: The New Science of Niklas Luhmann*, 87 MICH. L. REV. 1647, 1677 (1989).

[3] *Id.* at 1681.

[4] *Id.* at 1681.

[5] *See* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 3 (1969). The recent emergence of market economies in Eastern Europe has involved the restoration of certain civil law traditions. Note that "civil" has several different legal meanings, each most easily understand in opposition to something else. First, as indicated, there are "civil law" systems as opposed to common law ones. Second, civil can mean "non-criminal." For example, the course in "civil procedure" covers the rules for litigating civil cases as opposed to criminal cases, the latter being prosecutions brought by the government against those charged with violating the criminal law in which the state seeks a criminal punishment such as imprisonment. Litigation between private parties is always "civil," in this sense (though often not "civil" in the etiquette sense). Third, "civil" (more often, "civilian") can mean non-military. "Civil officers" are government employees outside the military; the civil courts (the ones you study in law school) handle litigation involving civilians, as opposed to the military courts, or courts martial, which apply military law and hear cases involving members of the armed forces.

[6] The influence of Roman law derives almost entirely from a single collection, the *Corpus Juris Civilis*, in which the sixth-century Emperor Justinian assembled the works of earlier jurists and emperors. Medieval legal scholars rediscovered and were preoccupied by a particular text from the *Corpus* known as *The Digest*. From the eleventh to the eighteenth century, the central aspect of legal development in Western Europe was the reception of Roman law. This culminated with the idea, borrowed from the *Corpus*, that law should be systematically codified and that Roman law offered the analytic tools for successful codification. The influence of Roman law on the common law is more uncertain; historians agree, however, that Roman and civil law did supply particular doctrines, terms, and perspectives to the common law, especially in such areas as mercantile and family law.

[7] Karl Nickerson Llewellyn (1893-1962), whom you will meet repeatedly in these materials, is generally considered one of the foremost legal scholars of the 20th century. A professor at the Columbia and University of Chicago Law Schools, he was among the most prominent and influential of the "legal realists." He is best-known today as the principal drafter and driving force behind the Uniform Commercial Code and as the author of *The Bramble Bush* (1930), a useful introductory guide for

> Nowhere more than in law do you need armor against that type of ethnocentric and chronocentric snobbery — the smugness of your own tribe and your own time: We are the Greeks; all others are barbarians.[8]

Although American jurists have always been ambivalent toward the English inheritance, American common law has been importantly shaped by its "reception" of the English common law. You have perhaps already noticed that all of your casebooks contain English cases, many of them decided after independence but nevertheless treated as groundbreakers for their particular patch of the law.[9] Indeed, the term "common law" is itself borrowed from England, where it referred to that body of customary law that was shared, or common to, the entire Kingdom (as opposed to idiosyncratic local customs or rules). About reception, you should know at least this:[10]

> How did the common law of England get over here, and to stay? In an opinion written a little more than fifty years after the Declaration of Independence, Justice Story said of the common law that "our ancestors brought with them its general principles and claimed it as their birthright." This is at best a figure of speech, and I greatly doubt that Story meant it as more than that. If there had been lawyers among those who sailed to Virginia in 1607 and to Plymouth in 1620, they would undoubtedly have brought the principles of the common law along with them as their most precious baggage, but the time for lawyers in America had not yet come. The historian-jurist Daniel J. Boorstin gives us a better picture of colonial law as it was in the beginning:
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> > Legal proceedings of the early years give us the impression of a people without much legal training and with few lawbooks who were trying to reproduce substantially what they knew 'back home.' Far from being a crude and novel system of popular law, or an attempt to create institutions from pure Scripture, what they produced was instead a layman's version of English legal institutions. * * *
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> Colonial law and judicial administration became increasingly professionalized in the first half of the eighteenth century. The evolution towards regularity and formal rationality in the operation of legal institutions was not as rapid in some colonies as in others, but it is discernible to a substantial degree everywhere. This is always true in developing countries,

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first-year law students. His two other most important works are *The Common Law Tradition* (1960), which examines appellate decisionmaking, and *The Cheyenne Way*, an interdisciplinary study, well ahead of its time, of dispute resolution among the Cheyenne. The standard biography is WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973).

[8] KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 44 (Oceana Pubs. 1960; 1st published 1930). The snobbery seems evenly and equally distributed. Merryman notes that "many people believe the civil law to be culturally superior to the common law, which seems to them to be relatively crude and unorganized." MERRYMAN, *supra* note 5, at 3.

[9] *See*, for just one example, a case most likely at least noted in your Torts casebook: *Rylands v. Fletcher*, In the House of Lords, 3 L.R.-E. & I. App. 330 (1868). It shaped the law dealing with abnormally dangerous activities conducted by an owner on his land.

[10] Harry W. Jones, *The Reception of the Common Law in the United States*, *in* POLITICAL SEPARATION AND LEGAL CONTINUITY 93–94, 96–99, 105 (Harry W. Jones ed., 1976).

as America then was. Every colony had its substantial property holders who looked to law for the security of their expectations. Commerce was on the rise, not only local business but also intercolonial bargains and overseas trade with England, and commercial undertakings, then as now, required reasonably certain law — and competent lawyers to structure transactions in sensible and effective form. The stage is now set in the colonies for the historically demonstrable cycle: (1) the security of interests and transactions requires some regularization of the law; (2) but the regularization of law creates an urgent need for lawyers; and (3) lawyers, when they come, bring about law's further regularization. * * *

The common law thus came to the colonies of British North America not in the ideological baggage of the first settlers but a century or so later, with the emergence of an accredited and active legal profession, the development of reasonable competence in the judiciary and the regularization of adversary procedures and precedent-based methods of legal reasoning. The principles of the English common law are now to be drawn on as sources of guidance for colonial decision-making. * * *

[I]ndependence made it necessary to formulate a theory of reception. English case-law was presumably applicable, within limits, so long as what were now American states had been colonies of the British Crown. But why and by what mandate should English law be any more authoritative in the now independent states than the law of any other foreign country? In state after state, efforts were made to state the theory and the limits of the reception in explicit terms. This proved to be a difficult drafting assignment, largely because the enacting state conventions and legislatures were by no means sure how much of the English law they wanted to receive and how much to reject. * * *

As a matter of pure theory, American reception may have been limited to the English law as it existed on some set date — 1775, 1776 or whatever — but as a matter of demonstrable fact, English judicial decisions handed down long after 1776 exerted a profound influence on nineteenth century American adjudication. The reception of the common law in the United States remained unfinished business long after American independence was established. Whatever cut-off date may have been recited in this or that state reception statute, American courts did not regard the spring of English common law doctrine as one that went dry for them on the day American independence was proclaimed. Throughout the formative period of American law and well into the later years of the nineteenth century, what was received here was not the closed book of English law as of 1776 but the open book of developing English common law doctrine.

The most important "reception" from England was perhaps not any particular body of doctrine but a way of thinking about law which made it easier for our great jurists (such as Story) to create an indigenous American jurisprudence.[11]

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[11] A quite wonderful (and very readable) book that tells you more about our legal traditions is GRANT GILMORE, THE AGES OF AMERICAN LAW (1977) (see especially Chapter Two, "The Age of Discovery"). *See*

B. "CASES"

When a lawyer talks of a "case," she most often means a past judicial decision that once and for all settled a dispute (a lawsuit) between two contending parties — a plaintiff and a defendant, as they most often are called. So one refers to the "case of" *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), in which the Supreme Court held that segregated public schools were unconstitutional. The reference tells us that the case was a lawsuit between Brown on the one hand and the Board of Education on the other, that the written opinion announcing and explaining the ruling can be found in volume 347 of the United States Reports (the set of books in which the United States Supreme Court reports its decisions) at page 483, and that the decision occurred in 1954.

But in talking of a "case," a lawyer might also be referring to a particular legal claim, the strength of which, in the common law system, can be evaluated only in light of prior "cases" — that is prior decisions made by courts when faced with situations with similar facts. Thus, suppose you consulted your lawyer about a dispute between you and X, whom you wish to sue. If she were to say, "I don't think you have much of a case," she would mean something like this: I have listened to your story, your tale of the events that transpired as you perceived them. I have done so with a measure of skepticism — because I know only too well that what you have told me is affected by whatever limits your perception and is undoubtedly shaped, consciously or not, by your aims, goals and desires. I have, nevertheless, converted your story into a chapter of the emerging law-story that we lawyers call "facts" and I have then put these facts into legally relevant categories drawing on my understanding of past cases that involved similar factual categories. Next I ascertained that the appropriate court or courts in those cases refused relief to the plaintiff and that they did so recently, firmly, unequivocally, and perhaps even unanimously. Or she means: there are prior, factually similar cases in which the plaintiff prevailed, but they all contained an important factual element that, in my judgment, was crucial to why they were decided the way they were and that element is missing in your case. Or: your story contains a factual element never present in those factually similar cases in which the plaintiff prevailed, and its presence here throws off all bets, because, frankly, I judge it to be quite detrimental to your cause, and I think the court will also think it to be detrimental to your cause.

In short, concludes your lawyer, I am predicting that you would lose this suit against X at this time with your specific facts. If you ask her, why should prior decisions determine the fate of my current dispute with X, she will answer: our legal system says that prior, *factually* similar cases constitute "precedent" for subsequent cases, and a doctrine called stare decisis dictates that courts must follow precedent. Of that, more later; for now, simply accept it (and note only the careful hedging in your lawyer's statement) because we must learn many other things about cases before dealing with stare decisis.

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also MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977) (especially Chapter One, "The Emergence of an Instrumental Conception of Law").

Cases as a Method of Instruction

Perhaps you now think that the reason you are carrying several pounds of cases into each of your courses is that they contain "The Law of" Contracts or Property or Torts or Civil Procedure or Whatever — and you attend those classes to learn The Law.

Wrong — as you know from the Foreword which warned you that there is no such thing as "The Law of" in the sense in which you probably still think of it: something stored in little black boxes to which your instructors refuse to give you the keys, probably because they want to keep their jobs! And even if such a body of law did exist, your casebooks would be an exceedingly poor tool for teaching it. As Karl Llewellyn observed long ago, "it is obvious that man could hardly devise a more wasteful method of imparting *information about subject matter* than the case-class. Certainly man never has."[12] Worse, the case method is misleading, because the cases you study are virtually all cases which the parties have carried, at great expense in time and money, to the highest tribunal that could or would hear them. By focusing almost exclusively on appellate opinions, you are studying only the very small tip of the very large iceberg of "law" or "the legal system."

Why study only the tip? Perhaps it is because

> many law professors experience vertigo when they open the doors and look outside appellate courtrooms. There is too much to look at, and it becomes difficult to produce elegant theories of law. * * * Those whose personalities need order slam the door quickly and turn back to rules and great cases decided by elite appellate courts.
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> If we mustered our courage and lifted our eyes from the pages of appellate reports and books written by famous dead Europeans, what might we see? Jerome Frank, with little success, long ago tried to provoke the academy to pay attention to trial judges.[13]

Nevertheless, "the academy" largely persists in making appellate opinions the virtually exclusive vehicle of law studies, at least in the first year. Is the reason really no more than vertigo?

The "case class" approach to legal education was largely the creation of Christopher Columbus Langdell (yes, that really was his name), the first dean of the Harvard Law School. You owe your present enrollment in law school to Dean Langdell:

> Langdell was hired by Charles Eliot, Harvard's new president, because twenty years earlier, when he was a student at Harvard, Eliot had been extraordinarily impressed by Langdell's approach to legal study. When Eliot later recruited Langdell, Harvard's Law School was in serious trouble with declining enrollments and widespread dissatisfaction with its quality.

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[12] Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL ED. 211, 215 (1948).

[13] Stewart Macaulay, *Popular Legal Culture: An Introduction*, 98 YALE L. J. 1545, 1546–1547 (1989). The reference is to Jerome Frank, a noted, some would say "extreme," Legal Realist, and his book, *Courts on Trial* (1949).

> If Eliot had not met Langdell two decades earlier, he might have succumbed to the view that education of lawyers did not belong in the university. Eliot might have closed Harvard's Law School, just as it had been shut down in 1829 when enrollment fell to one student. In closing Harvard Law School, Eliot might logically then have instructed the departments of philosophy and political economy to deal with whatever they considered important and legitimate about law. If this hypothetical set of events had occurred, there could have been a decoupling of the universities and the legal education of people eager to become practicing lawyers. If so, both legal education and university scholarship about law would have evolved in very different patterns.[14]

One way of legitimizing law as an academic field worthy of university instruction as an autonomous discipline was to align or associate it with the natural sciences. Langdell's central innovation growing out of this conception was the case method. In the preface to his original contracts casebook, Langdell explained:

> Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless and worse than useless for any purpose of systematic study. Moreover, the number of fundamental legal doctrines is much less than is commonly supposed * * *. It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines; and that such a work could not fail to be of material service to all who desire to study that branch of law systematically and in its original sources.[15]

Langdell's novel approach to legal education initially drove virtually every student at the school out of his classroom. But Langdell had the last laugh, and the case method has certainly carried the day. The question is whether it makes sense.

Edwin W. Patterson, the late Cardozo Professor of Jurisprudence at Columbia University Law School, enumerated four benefits claimed by advocates of the case method: (1) *historical*, because it best enables students to grasp the development of the law; (2) *pedagogical*, because it forces students to participate actively in their

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[14] David Barnhizer, *The Revolution in American Law Schools*, 37 CLEV. ST. L. REV. 227, 261 (1989).

[15] CHRISTOPHER COLUMBUS LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS vi–vii (1870).

education; (3) *pragmatic*, because it gives early training in what lawyers do; and (4) most importantly, *scientific*, in that it focuses on the raw materials of "the science of law."[16]

The first of these justifications is a makeweight; historical understanding is neither a necessary part of, nor unique to, the case method. The second is in our view correct, although slightly overstated. Unfortunately, the case method does not in fact "force" you to participate intellectually; it only creates an incentive to do so. In some cases the incentive backfires; the case method can actively discourage students. In any event, this is a question of pedagogy more than one about the nature of law.

The most interesting defenses of the case method are the third and fourth. In our view, the third is the central justification for the continuing use of the method; the fourth in large measure an anachronistic and wrongheaded misconception. We will consider them in reverse order.

The Law as Science

Consider the following debunking:

> Christopher Columbus Langdell, who in 1870 became the first dean of the Harvard Law School, has long been taken as a symbol of the new age [— an age of faith and blind self-confidence among lawyers and legal academics]. A better symbol could hardly be found; if Langdell had not existed we would have had to invent him. Langdell seems to have been an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius. Langdell's idea evidently corresponded to the felt necessities of the time. However absurd, however mischievous, however deeply rooted in error it may have been, Langdell's idea shaped our legal thinking for fifty years.
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> Langdell's idea was that law is a science. He once explained how literally he took that doubtful proposition:
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> > [A]ll the available materials of that science [that is, law] are contained in printed books. . . . [T]he library is . . . to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists.[17]

Regarding the idea of a "science of law" Judge Posner has said:

> The idea that law is an autonomous discipline, by which I mean a subject properly entrusted to persons trained in law and in nothing else, was originally a political idea. The judges of England used it to fend off royal interference with their decisions, and lawyers from time immemorial have

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[16] Edwin W. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEG. EDUC. 1, 2–10 (1951).

[17] GRANT GILMORE, THE AGES OF AMERICAN LAW 42 (1977) (quoting A. Sutherland, The Law at Harvard 175 (1967)).

used it to protect their monopoly of representing people in legal matters.[18]

As an example, Judge Posner offers a well-known statement by Sir Edward Coke, at the time Chief Justice of the English Court of Common Pleas:

> [T]hen the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: and that the law was the golden met-wand and measure to try the causes of the subjects; and which protected his Majesty in safety and peace.[19]

Judge Posner continues:

> Langdell in the 1870s made [the conception of law as an autonomous discipline] an academic idea. He said that the principles of law could be inferred from judicial opinions, so that the relevant training for students of the law was in reading and comparing opinions and the relevant knowledge was the knowledge of what those opinions contained. He thought that this procedure was scientific, but it was not, not in the modern sense at any rate. It was a form of Platonism; just as Plato had regarded particular chairs as manifestations of or approximations to the concept of a chair, Langdell regarded particular decisions on contract law as manifestations of or approximations to the legal concept of contract.[20]

Judge Posner goes on to call this a "perverse or at best incomplete way of thinking about law."[21] In what lies the perversity? Or, less damning, the incompleteness?

At this point we ought to ask the logical corollary: is it equally perverse or incomplete to view *science* as science?[22]

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[18] Posner, *supra* note 1, at 762.

[19] *Id.* at 762, n.1 (quoting Prohibitions Del Roy, 6 Coke Rep. 280, 282 (1608)). Lord Coke (1552-1634) was an early collector of precedents; through his own reports, he was largely responsible for the now standard practice of reporting opinions fully. He is best-known for his assertions of the primacy of the common law, both over the King (in the quoted excerpt) and over Parliament (in the celebrated, but long since abandoned, 1610 decision in *Dr. Bonhman's Case*).

Coke's independent stance was successful only up to a point; in 1616 King James I removed him from office, essentially for insufficient malleability. Should judges be removable from office? By the President or Governor? The legislature? The public? Other judges?

[20] *Id.* at 762.

[21] *Id.*

[22] Alan Wolf, Professor of Physics at Cooper Union and, at the time, our student, presented the authors with what follows.

You may have come to law school with the idea that law is "scientific" in the following sense. The applier of law (judge, scientist) looks up the existing rules (precedents, equations) and applies them to particular situations (appellate cases, laboratory experiments). Often a "blind" application of the rules succeeds (justice is done, correct predictions are made), but sometimes a more creative effort is required. When old rules fail to meet our needs (society changes, new experimental realms are explored), we create new rules or modify old ones. We hope that the rules generally improve with changes, but we suspect that our work will never be finished (society is always evolving, there are ever more subtle physical phenomena to understand).

Langdell's method of case law study is said to be a scientific one, so you might expect legal study to resemble your study of, say chemistry. In chemistry you were told that PV = NRT was the relationship between gas pressure, volume, and temperature. Class discussion focused primarily on how to apply the rule, and interesting consequences of the rule. Legal case analysis couldn't be more different. You are given no lists of rules, instead you are asked to deduce the rules from an analysis and comparison of cases. Such a "discovery" method of teaching is rare, but not unheard of in science. In a discovery course, students perform classic scientific experiments, unaware of the results they should obtain.

The far more common method of teaching science is to *present* the fundamental rules (these cannot be derived from more elementary principles, we must appeal to experimental confirmation), and to *derive* the applied rules (these are essentially combinations of the fundamental rules). So the law/science analogy seems to break down. The rules of law are confusing and uncertain, and you are asked to play games to find them. The rules of science are simple (in the sense that they can be expressed concisely and unambiguously) and they are universally True. The most important equation of physics is Newton's Second Law of motion, F=ma. It says that the harder I kick an object, the faster it will fly away. Simple and True.

A month or two into the frustrating process of case analysis, you will suspect that cases are decided, not according to rules, but according to judicial whim, lawyer ineptitude, political pressures, and likely the phase of the moon. At this point science and law stand in sharp contrast. Science is Truth (logic, rigor, consistency), and law is a mess (human foibles, politics, economics). If it made any sense quantitatively to compare the truth of science to the truth of law, most everyone would agree that science has a dramatic lead, but it may interest (and dismay? comfort?) you to know that science is not as perfect as you may have thought.

The fundamental physical laws are based on neither logic nor mathematics, they are simply "thought up" and found to be consistent with a set of experiments. Newton's Second Law was "the law" for centuries, but the more precise experiments of modern physics (circa 1900) disproved the law, so Truth was replaced by "approximately true under certain circum

stances." More accurate versions of Newton's Second Law are far more complex mathematically, but no more logically provable than F=ma.

The applied rules of science rest on the shaky foundation of the fundamental laws, but the applied rules are more than a simple combination of these laws. Approximations of many types are required, each of which limits the accuracy and applicability of the results. Often it is necessary to make assumptions that are not testable or even plausible, simply to be able to proceed with a computation.[23] Bertrand Russell said "All exact science is dominated by the idea of approximation." Students of science, but also scientists and science teachers have a largely unconscious tendency to forget about the approximations and limitations, and to think of and present their results as more True than they really are.

Understanding the imperfections of science should make you feel more forgiving toward law, which, after all, has to solve problems far more complex than science.

Professor Patterson raised a different objection to the idea of "law as science":

> [I]n none of these discussions [of law as science] was it recognized that a rule or principle of law is primarily normative or prescriptive in meaning, whereas scientific propositions are either true or false upon the basis of empirical observations.[24]

The normative quality of law is an essential concept to understand — both because such an understanding will help you to decipher cases, and because it will lead you to think more clearly about what "law" is.

Suppose you enter a classroom and see a sign on the wall that reads "No Smoking." Is it appropriate for you to say about the words, "No Smoking," "That is not true" (or, "That is true")? If it is not appropriate, what does that imply about the nature of the words, "No Smoking"? If you cannot say the legend is true or false, what observations can you make about it? Can you say about the *sign*, "That is not true," and what would you mean by that? Do you understand the difference between commenting on the *legend* and on the *sign*?

Presumably, no one will be smoking in the room. What observations can you make about that? If someone is smoking, does that act now make the words "No Smoking" "not true," "false" or what?

If you sue the cement factory next door because it emits dust that settles on your house, and the court says: "We find that the cement factory has (does not have) a right to do that," is that like saying "No Smoking" or is it like saying, "In the United

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[23] Here are *some* of the approximations used in PV = NRT, the "ideal gas *law*":

1) that the gas molecules occupy no space (wrong);

2) that the huge number of molecules bouncing off the container walls define a constant value for the pressure (wrong); and

3) that there are an infinite number of gas molecules — hence a statistical approach is correct (wrong).

[24] Patterson, *supra* note 16, at 4.

States the 4th of July is a national holiday"?

When, prior to bringing suit, the plaintiff in our cement factory case tells the factory owner, "As a matter of fact, you have no right to do that!" what is he doing? Is his statement any more than "whistling in the dark"? Is it whistling in the dark when he orders his 10 year-old son, "Clean your room" or tells his secretary, "This letter must go out tonight"?

Is to say "as a matter of fact, I have the right to do that" a nonsensical sentence? Always? Sometimes? Never? In the factory example, is "as a matter of fact you have no right to do that" a meaningful utterance before the court has spoken? After the court has spoken?

What does all this have to do with Professor Patterson's observation? With your understanding of cases? Your understanding of what "law" is about?

Suppose you understand that an opinion in a given case is a mixture of descriptive language, verifiable as true or not, and normative language, verifiable, if that is the right word ("legitimated"?) by standards other than empirical ones.[25] What do you gain from that understanding?

Practical Benefits of the Case Method of Instruction

Although decided cases are obviously essential (if incomplete) data for understanding what judges do and what the law requires, it is rare that anyone now defends the case method on the basis that it is the most scientific approach to a scientific discipline. Rather, the central modern justification relies on a vision of law school as professional training.

> [The case method] has survived because it has been widely esteemed as an efficient and effective means of inculcating intellectual skills, or habits of thinking, which are deemed valuable in the practice of law. People who have studied cases are changed by the experience; the change is often substantial, and may be more profound than that usually wrought by any other experience provided in higher education.
>
> Case method instruction develops several types of important legal intellectual skills. Such instruction gives a practical bent to the student's thinking; cases are problems, and students reading cases are also trying to solve problems. The activity hones the student's sense of relevance as he acquires the habit of distinguishing between ideas that are useful and those that are not. . . . Additionally, such study helps develop greater balance in thinking. Discussion and analysis of cases require the student to consider both sides of issues. A student who has considered both sides of several thousand cases is less likely to engage in self-deception about the strength and righteousness of his position. * * * Tolerance for ambiguity also improves; professional instinct is heightened.

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[25] R.M. HARE, THE LANGUAGE OF MORALS (1952), deals with the distinction between descriptive and prescriptive language. It is a wonderful and accessible book that you might want to look at.

> Case study is also important as a means of elevating such basic skills as reading, speaking, and listening. This results from the extensive dialogue between teacher and students, and among students, which is greatly facilitated by the framework for discussion provided by the cases being read together by the group. * * *
>
> Students who acquire these intellective traits and habits in adequate supply have also acquired the capacity to become their own professional teachers. To the extent that a person has achieved competence in case method instruction, he is capable of mastering large amounts of new legal material with little or no help. * * * While bare doctrine can be simplified and confined in study outlines and thus assimilated more efficiently than by the case method, understanding of doctrine and underlying policy is enhanced and deepened if the understanding is acquired as a result of the student's own synthesis in the course of problem solving. A student who has read and discussed a hundred antitrust cases, for example, will generally have a much firmer grip on that field, and its difficulties and ambiguities, than one who has invested equal time in passive submission to lecture, outline, and text.[26]

Because at least one of the schools' missions is to train students for the "business of law," that is, for *practice*, it is safe to predict that cases will indeed remain a foundational part of your legal education and, for that matter, will accompany you through your professional life as a lawyer.

C. COURTS

Cases are decided, and decisions issued, of course, by courts. The United States contains a vast number and variety of courts, many operating in distinct but overlapping systems. There is no such thing as "the American judicial system" as such. As Daniel Meador has explained:

> The great divide in the American legal landscape is the state-federal line. It derives from the United States constitution, pursuant to which the federal government was created in 1789 to "form a more perfect Union" of the existing states. The federal government and the state governments coexist, with a broad range of powers delegated to the former and all others reserved to the latter, although there are certain powers that can be exercised concurrently. Each of these governments has its own court system, autonomous and self-contained. * * *
>
> The federal judiciary and the fifty state judicial systems are each constructed like a pyramid. In broad outline these systems are similar, but they vary in the details of their organization and business. Across the base are the trial courts, and the courts of first instance. At the apex is the court of last resort, usually called the Supreme Court [though in New York State, oddly, the Supreme Court is the trial-level court and the highest court is

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[26] Paul D. Carrington, *Book Review*, 72 CAL. L. REV. 477, 490–491 (1984) (reviewing Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s (1983)).

called the Court of Appeals]. In most states and in the federal system there is a middle tier, the intermediate appellate courts. * * *

When opinions of American courts are published, they are collected in various sets of bound volumes known as reports. Most states have their own official reports, and decisions from all states are included in regional reports provided by private publishers for the convenience of users. There are other reports for federal decisions. * * * In addition to being published in bound volumes, court decisions, statutes, and regulations are now available nationwide through electronic data retrieval systems * * *.

American courts adhere to the adversary process, as distinguished from the inquisitorial process that prevails on the continent of Europe and in numerous countries elsewhere. In both civil and criminal cases, the parties through their lawyers are solely responsible for presenting the facts to the court * * * [though most cases are settled and] only some 5 to 10% of cases actually go to trial. At trial, the lawyers call and question the witnesses. The testimony elicited in court, along with all other items admitted into evidence by the judge (e.g. documents), forms the trial record. Based on this adversarial "party presentation," the trial court makes determinations of fact, applies the pertinent law, and enters judgment accordingly. . . .

In civil cases, any party dissatisfied with the outcome of the case may appeal, but in practice only a small percentage of judgments are taken beyond the trial court. In criminal cases, a high percentage of all convictions is appealed by defendants (normally the prosecution cannot appeal an acquittal). Appeals are based solely on the record made in the trial court. No witnesses appear and no new evidence can be offered at the appellate level; normally no questions can be raised there for the first time. Unlike trial courts, over which a single judge presides, appellate courts are multi-judge forums acting collegially. Appellate courts generally confine themselves to reviewing questions of law raised in the trial court proceedings; factual determinations made by the trial court are not normally disturbed. The appellate court's sole function is to determine whether, as a matter of law, the trial court's judgment should be affirmed, reversed, or modified in some way. If the appellate court concludes that the lower court erred in its application of the law, the appellate court may reverse the lower court's decision. It will do so unless the reviewing judges conclude that the error was relatively minor and probably did not affect the outcome in the trial court [i.e., was "harmless error"]. . . .

The state courts are the front-line adjudicators in the United States. They overshadow the federal courts both in the number of cases they handle and in the number of persons involved as litigants, lawyers, and judges. In the trial courts of the fifty states, more than 30,000,000 cases, civil and criminal, are filed annually, compared with fewer than 314,000 in the principal federal trial courts (the district courts) and 1,300,000 in the federal bankruptcy courts. In numbers of judges the state courts likewise eclipse the federal. There are over 29,800 judges in the state trial courts,

> while there are fewer than 1,500 federal trial judges (district, bankruptcy, and magistrate judges).[27]

Within a single jurisdiction (e.g. the State of New York, or the federal system) courts are organized hierarchically, as the foregoing excerpt indicates. This arrangement is illustrated in Appendices A (federal courts), B (New York state courts), and C (California courts). In addition, judicial jurisdiction is subdivided geographically. So a trial court will have jurisdiction of cases arising within the geographic area in which it sits. Appellate courts cover a larger area than trial courts; the Supreme Court covers the entire jurisdiction. This arrangement for the federal courts is illustrated in Appendix D.

D. JUDGES

Courts have fairly large staffs, but, of course, their key members are the judges themselves. Unlike many countries, the United States has no professional track for judges; future judges receive no special education or training and follow no special career path. Judges are lawyers who at some point were appointed or elected to the bench. We offer only three quick observations about the American judiciary here.

First, with regard to *independence*. As part of the general concept of "separation of powers," government authority in the states and at the federal level is divided into three separate branches: legislative, executive, and judicial. Professor Meador again:

> Each part must be in the hands of different officials of official bodies. Put in its simplest form, the doctrine requires that the legislative branch make the law through the passage of statutes, the executive branch enforce the law, and the judicial branch interpret and enunciate the meaning of the law through the adjudication of disputes. By this dividing power, the doctrine aims to protect citizens from abuse of official authority stemming from its concentration in the hands of too few persons or in a single body. In the mystique of American politics, this arrangement is viewed as fundamental to liberty and to government under law. It is embodied in all American government structures; hence, the federal and state courts function as separate branches of government, independent of the legislative and executive branches.[28]

Essential to this arrangement is protection of the courts from oversight or retribution from the other branches — that is, the existence of an independent judiciary. The legislative and executive branches cannot alter a judicial ruling; there is no appeal from the courts to the other branches; and judges cannot be penalized for ruling in a way disfavored by the other branches. (The legislature can, of course, modify the legal rule applied or articulated by the court in its ruling; that is its function as the lawmaking institution of government. But it cannot adjudicate or review judicial adjudications.) At the *federal* level, this independence is constitutionally protected by "life tenure" (judges hold their positions for life; they can be

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[27] DANIEL JOHN MEADOR, AMERICAN COURTS 1–8 (2d ed. 2000). Reprinted with permission.

[28] *Id.* at 2.

removed from office only through impeachment) and a guarantee that their salaries will not be diminished.[29] *State* judges generally hold office for a specific term of years, after which they must be reappointed or re-elected.

Second, with regard to *selection*. How should judges be selected? The basic methods are three. First, all federal judges, and the judges of some states, are appointed by the head of the executive branch (the President or the Governor). Federal judges are, to be precise, *nominated* by the President and *confirmed* by the Senate. See U.S. Const., art. II, sec. 2. Second, many states use what is commonly referred to as "merit selection," which is a variation on gubernatorial appointment in which a bipartisan commission draws up a short list of names from which the Governor must select. Third, most states hold elections for at least some of their judges. In most instances, these are partisan (i.e., the candidates identify what political party they belong to and run as the nominees of their parties); some states require that judicial elections be nonpartisan.

The choice between appointing and electing judges has been a matter of longstanding, and continuing, debate. In part, this disagreement reflects a contest over what it is judges actually do (or should do). The standard justification for *electing* judges is that "judges make policy [and] * * * like other policymakers, they should be accountable to the people in a representative political system."[30] The standard justifications for *appointing* judges are that judges ought to be independent from politics and the popular will, pursuing the law where it leads rather than yielding to popular pressure, and that the general public is not well-equipped to evaluate judicial ability. During debate over ratification of the Federal Constitution James Madison noted that, while in general high-ranking governmental officers ought to be selected by the people,

> [s]ome deviations . . . from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; second, because the permanent tenure by which the appointments are held in that department must soon destroy all sense of dependence on the authority conferring them.[31]

Both the election and the appointment of judges are, at this point in American history, quite politicized and polarizing.

Third, with regard to *composition*. Historically, both the federal and state judiciaries were composed of successful, white, male lawyers. In the last generation or two, there has been a significant increase in the diversity of the bench, with an increasing number of women and minority judges drawn from a variety of practice

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[29] "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const., art. III, § 1.

[30] David Adamany & Philip Dubois, *Electing State Judges*, 1976 Wis. L. Rev. 731, 772.

[31] The Federalist No. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961).

backgrounds. To most, this seems a salutary change. But why, exactly? Consider the following:

> [It is a common] complaint that the judiciary is not adequately "representative" of society as a whole. Advocates of a more representative bench often fail to identify precisely the value of such diversity. Three overlapping justifications are implicit. First, the bench, like any profession, should be open to all regardless of race or gender. * * * Second, a "representative" judiciary (or Congress or school board) has symbolic value. Those subject to the commands of a governing body will have more confidence in and respect for that body if it includes a member or members who are "like" them. Third, representativeness will affect substantive outcomes; that is the basic realist critique and the assumption, or hope, underlying much reluctant support for the [Clarence] Thomas nomination. These latter two justifications are linked. It is because decisions are affected by the decisionmaker's background and group membership that "representativeness" has symbolic value. Public confidence in governing bodies hinges much more on their representativeness than does public confidence in, say, the space program. Thus, the reason "representativeness" matters with regard to judges is that they *do* act on behalf of the public and they do so through the elaboration of norms that are not wholly objective.[32]

As was keenly illustrated during the 2009 confirmation hearings for Justice Sotomayor, most people are more comfortable with the first two justifications, than with the third. The nominee spent a large portion of her testimony backtracking from, spinning, and contradicting this statement from a 2002 speech:

> [O]ur experiences as women and people of color affect our decisions. The aspiration to impartiality is just that — it's an aspiration because it denies the fact that we are by our experiences making different choices than others.
>
> Whether born from experience or inherent physiological or cultural differences * * * our gender and national origins may and will make a difference in our judging. Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. * * * I am * * * not so sure that I agree with the statement. First, * * * there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.[33]

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[32] Michael Herz, *Choosing Between Normative and Descriptive Versions of the Judicial Role*, 75 MARQUETTE L. REV. 726, 746–747 (1992).

[33] Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 91–92 (2002).

E. LITIGATION: HOW A DISPUTE BECOMES A "CASE"[34]

As said earlier, the cases you will read in law school (and as a practicing lawyer) are, for the most part, appellate decisions. That is, the case has been brought to trial, a verdict rendered by the factfinder (either a judge or jury), one party (or both) has appealed the decision to the next higher court in that jurisdiction. What question is before the court on appeal? Who has brought the appeal, and what happened in the court below? The answer to these questions will tell you the *procedural posture* of the case you are reading and, ultimately, shed light on exactly what issue(s) the case does — *and does not* — address.[35]

Your ability to read and understand a case thoroughly will depend in no small measure on your understanding of how cases are brought, tried, and appealed — in short, Civil Procedure. The following discussion is provided to assist you in your general understanding of how a lawsuit is brought in court.[36] We will trace the steps involved in bringing a civil action in the context of a simple hypothetical.[37]

Victim v. Driver

You are a lawyer in the State of Euphoria. Victim comes to you with a problem. She was getting onto her motorcycle in front of the local DVD store, having just rented an instructional DVD on tree house renovation, when Driver rounded the corner in his '57 Edsel, lost control of the wheel, and slammed into Victim and her bike. Victim lists for you all of the troubles she has suffered as a result of the accident: her back and neck were sprained, her motorcycle was totaled, she missed three weeks of work as an aerobics instructor, and she never got to see the DVD she had rented. You take notes during the interview and tell Victim you will get back to her. Now, alone in your office, what do you do?

Is there a cause of action?

Your first job as a lawyer is to determine if Victim has a legally cognizable claim, or *cause of action* — that is, has she suffered something at the hands of Driver for which the courts will grant her relief? As a practical matter, you must also assess her chances of winning even if her claim is legally sufficient. Remember, in our system of justice, a plaintiff must prove that the defendant has done what is

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[34] (c) 1992 Victoria A. Kummer. Ms. Kummer was a student in our Legal Process Workshop. She undertook the task of preparing the following pages. Her goal was to render a complex process understandable to raw novices without distorting it. We obviously believe that she succeeded splendidly. We would only add this caveat: the goal here is to give you a "palm-of-the-hand" view of matters procedural. Inescapably, some finer points and distinctions have been ignored. You will learn about all of them in due course in Civil Procedure.

[35] Remember, a court can only make a binding ruling on a question that is squarely before it. Musings by a court on an issue outside the specific question it faces are called *dicta* and, while persuasive, do not carry the authority of an actual holding.

[36] As you undoubtedly know by now, Civil Procedure is a fascinating and complex area of study to which law schools typically devote an entire semester, or even a year. This rudimentary outline is merely an introduction to the basic concepts of Civil Procedure.

[37] Our concern at this juncture is only civil cases. The somewhat different procedures of a criminal action, in which the State brings a case against a defendant for criminal wrongdoing, will not be treated here.